

# Witness anonymity and the South African criminal justice system

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## ABSTRACT

This article will focus on witness anonymity as a tool to encourage the reporting of criminal activities and criminal victimisation by victims and other witnesses, and as a mechanism to ensure that witnesses in criminal proceedings are duly protected. This will be juxtaposed against an accused's right to a fair trial, in terms of s 35(3) of the Constitution of the Republic of South Africa, 1996 and relevant provisions of the Criminal Procedure Act,<sup>1</sup> as well as the foundational principle of the criminal justice system that an accused has a right to confront witnesses testifying against him or her and that such testimony should be given in an open court and in the presence of the accused. Arguments in favour of witness anonymity, primarily based on the contention that the right of confrontation is not absolute, will be considered together with examples from other jurisdictions and arguments asserting that the curtailing of the right of confrontation to accommodate true witness anonymity are too extreme and inconceivable in terms of an accused's right to a fair trial.

## 1. Introduction

Statistics confirm that all South Africans – irrespective of their sex, race, financial status or social standing – experience some form of criminal victimisation.<sup>2</sup> Those most vulnerable, like the poor and unemployed, as well as children and the youth, experience and witness exceptionally high levels of criminal victimisation.<sup>3</sup> However, with the first national victimisation survey conducted in 1998 it already became apparent that only 50% of all crimes were reported to the South African Police Service. The comparable 2003 National Survey noted increased reporting rates, but only with regard to certain types of crimes, and

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<sup>1</sup> Sections 152, 153, 154, 158 – 167 & 170A–173 of the Criminal Procedure Act 51 of 1977.

<sup>2</sup> For the SAPS Crime Statistics for the period April 2008 – March 2009 visit, available at [http://www.saps.gov.za/statistics/reports/crimestats/2009/crime\\_stats.htm](http://www.saps.gov.za/statistics/reports/crimestats/2009/crime_stats.htm), accessed 25 November 2009.

<sup>3</sup> C Frank *Victimisation in South Africa and the needs of crime victims* Monograph 137, July 2007 Institute for Security Studies, available at [http://www.iss.co.za/static/templates/tmpl\\_html.php?node\\_id=2960&slink\\_id=5488&slink\\_type=12&link\\_id=4059](http://www.iss.co.za/static/templates/tmpl_html.php?node_id=2960&slink_id=5488&slink_type=12&link_id=4059), accessed 25 November 2009.

the National Youth Victimization Survey from 2005/2006 indicated that only one out of every ten respondents reported cases of assault to the police.<sup>4</sup>

One of the reasons for these poor reporting rates of crimes and criminal victimisation in South Africa can be attributed to the fear that witnesses have for offenders, the fear of harassment, intimidation and other consequences that may result from their decision to report crime and which may, with regard to whistleblowers, also include loss of employment.<sup>5</sup> It is furthermore said that the experience of such secondary victimisation or intimidation will not only reduce the likelihood that citizens will engage with the criminal justice system about the particular crime in question, but also with regard to other criminal events in future.<sup>6</sup>

This article will focus on witness anonymity not only as a tool to encourage the report of criminal activities and criminal victimisation by victims and other witnesses, but also as a mechanism to ensure that witnesses in criminal proceedings are duly protected. This will be juxtaposed against an accused's right to a fair trial, in terms of s 35(3) of the Constitution of the Republic of South Africa, 1996 and relevant provisions of the Criminal Procedure Act,<sup>7</sup> as well as the foundational principle of the criminal justice system that an accused has a right to confront witnesses testifying against him or her and that such testimony should be given in an open court and in the presence of the said accused.

It must be noted that this article will focus exclusively on witness anonymity as a means of protection for victim-witnesses and other witnesses. Although reference will be made to other special legislative measures of protection – such as the use of intermediaries,<sup>8</sup> as

<sup>4</sup> Ibid.

<sup>5</sup> It should be noted that repeat victimization is not the same as intimidation, although the same offenders may be responsible for both and the same witness/victim may be both re-victimised as well as intimidated. In witness intimidation the intent is to discourage the victim from reporting a crime or cooperating with the prosecution. In repeat victimization, however, the motive is acquisitive. K Dedel 'Problem-orientated Witness Intimidation in Guides for Police, Problem-Specific Guide Series', Guide No 42 (July 2006), available at <http://www.docstoc.com/docs/6626586/Witness-Intimidation>, accessed on 30 November 2009; J Irish, W Magadhla, K Qhobosheane, & G Newham *Testifying Without Fear: A Report on Witness Management and the National Witness Protection Programme in South Africa Research* report written for the Centre for the Study of Violence and Reconciliation, October 2000 (see J Irish, W Magadhla, K Qhobosheane & G Newham at <http://www.csvr.org.za/docs/policing/testifying-withoutfear.pdf>, accessed 6 October 2010); *S v Staggye & Another* 2003(1) SACR 232 (C).

<sup>6</sup> Dedel op cit (n5) 6.

<sup>7</sup> Sections 152, 153, 154, 158 – 167 & 170A – 173 of the Criminal Procedure Act 51 of 1977.

<sup>8</sup> Section 170A.

well as the use of closed circuit television and other electronic media,<sup>9</sup> – these alternative measures will not be dealt with in depth.

## **2. Witness anonymity defined**

Witness anonymity in its most extreme form refers to witnesses who provide testimony in criminal proceedings without being seen, heard or identified by the accused (and his/her legal representative(s)) or anybody else in the public arena of the court room. While a limited number of jurisdictions do make provision for such true or complete witness anonymity in criminal matters (see section three below), in South African law, no provision for complete witness anonymity is made. In fact, the right to confront witnesses and accusers is explicitly provided for in sections 152 and 158(1) of the Criminal Procedure Act,<sup>10</sup> where it is required that accused persons are present at their trial and that such a trial be conducted in an open court. Emphasis is furthermore placed on the *viva voce* testimony of witnesses in (especially) criminal matters.

However, some exceptions to this foundational principle of confrontation in the South African criminal justice system have crystallised over time. For example, in s 153(2) of the Criminal Procedure Act the legislator makes specific provision for situations where the likelihood exists that harm may result to a person, other than the accused, who testifies in a criminal matter. In such instances the court has the discretion to direct that the witness testifies behind closed doors and that no person shall be present when such evidence is given unless his/her presence is necessary in connection with the proceedings or is authorized by the court.<sup>11</sup> The court may also direct that the identity of such a witness not be revealed or that it shall not be revealed for a period specified by the court.<sup>12</sup> Section 153(2) does not, however, make provision for complete witness anonymity in the sense that no person, not even the accused and legal representatives in a particular case, know the identity of the witness.

Other provisions aimed at the protection of the identity of a witness in South African law include s 153(1) of the Criminal Procedure Act which allows for criminal proceedings to take place behind closed doors if it is in the interests of the security of the State, of good order, of public morals or of the administration of justice. Moreover, a court may direct that no information relating to such proceedings, or any part thereof, held behind closed doors shall be published in any

<sup>9</sup> Section 158(2) of the Criminal Procedure Act 51 of 1977.

<sup>10</sup> Act 51 of 1977.

<sup>11</sup> For example: *S v Manqina & Others* 1994 (2) SACR 692 (C).

<sup>12</sup> Section 153(2)(b) of the Criminal Procedure Act 51 of 1977.

manner whatsoever.<sup>13</sup> This includes information which may reveal the identity of a particular protected witness.<sup>14</sup> Sections 158(2)(a) and (b) of the Criminal Procedure Act,<sup>15</sup> that allow a court to – on its own initiative, on application by the public prosecutor, accused or a witness – order that a witness or an accused, if the witness or accused consents thereto, give evidence by means of closed circuit television or similar electronic media if it will prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.<sup>16</sup> The right of an accused person to cross-examine witnesses and confront people testifying against him/her is however still protected as subsec (4) of s 158 of the Criminal Procedure Act provides that the prosecutor and the accused (or his/her legal representative) have the right, by means of the closed circuit television or other electronic media, to question the witness and to observe the reaction of that witness.

With regard to parties involved in matters of a sexual nature and for persons under the age of 18 years, special provision is made in ss 153(3) and 153(4) – (6) of the Act respectively. With regard to matters of a sexual nature it is directed that in cases where it is alleged that the accused committed or attempted to commit any offence as contemplated in s 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007, or any act for the purpose of furthering the commission of such a sexual offence, or extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such a person, compelling the person to render an advantage; the court may hold that any person whose presence is not necessary at the proceedings or any persons or class of persons mentioned in the request, shall not be present at the proceedings. Furthermore, in such cases judgment shall be delivered and sentence passed in an open court only if the court is of the opinion that the identity of the said person would not be revealed thereby. Also, any person whose presence is not necessary at criminal proceedings in these instances shall not be admitted at such proceedings while the protected individual referred to in these particular subsections is giving evidence, unless the protected individual or his/her parent or guardian (if the person is a minor) requests otherwise.

And, with regard to minors, children under the age of 18 years, the Child Justice Act 75 of 2008 permits only the child, the probation officer and the child's parents or an appropriate adult or guardian to

<sup>13</sup> Section 154(1) of the Criminal Procedure Act 51 of 1977.

<sup>14</sup> Section 154(2)(a) of the Criminal Procedure Act 51 of 1977.

<sup>15</sup> Criminal Procedure Act 51 of 1977.

<sup>16</sup> Section 158(2)(e) of the Criminal Procedure Act 51 of 1977; For example: *S v Domingo* 2005 (1) SACR 193 (C), *S v M* 2004(1) SACR 238 (N).

be present at a preliminary enquiry.<sup>17</sup> The presiding officer at such a preliminary enquiry may exclude any such person mentioned from attending the inquiry if that person's presence is not in the best interest of the child or if it undermines the inquisitorial objectives of the preliminary inquiry.<sup>18</sup> A further example of an initiative to protect witnesses is the Witness Protection Programme of the NPA (National Prosecuting Authority), as regulated<sup>19</sup> by the Witness Protection Act.<sup>20</sup> This programme is intended to deal only with a small number of the most extreme cases of witness intimidation and the threat of harm.<sup>21</sup> It primarily provides protection to witnesses/victims until the case is completed in court, while relocation of such witnesses/victims and the remoulding of their identity, is in actuality an extremely unusual and rare occurrence.<sup>22</sup> The Witness Protection Programme is furthermore also not without its own problems, regarding effectiveness, security and the willingness of witnesses to participate.<sup>23</sup>

The final exception in the Criminal Procedure Act,<sup>24</sup> to the fundamental right of confrontation is found in s 170A of the Act. This provision allows for the appointment of an intermediary in order to enable a witness, who is under the biological or mental age of eighteen years, and who would suffer undue mental stress or suffering if he/she would testify, to provide evidence through that duly appointed intermediary.<sup>25</sup> No examination, cross-examination or re-examination of such a witness make take place other than through the appointed intermediary, and such an intermediary may convey the general purport of any question to the relevant witness.<sup>26</sup> Subsection (7) of the provision also requires a court to provide reasons for refusing any application or request by the public prosecutor for the appointment of

<sup>17</sup> Section 44 of the Child Justice Act 75 of 2008.

<sup>18</sup> Sections 44(3) and 44(4)(a) and (b) of the Child Justice Act 75 of 2008.

<sup>19</sup> Section 185A of the Criminal Procedure Act 51 of 1977, dealt with this issue prior to its repeal by the Witness Protection Act 112 of 1998.

<sup>20</sup> Witness Protection Act 112 of 1998 (It only became operational in March 2000 due to budgetary constraints.)

<sup>21</sup> D Bruce 'Danger, threats, or just fear: Witness intimidation in three Gauteng courts' (September 2005) 13 *SA Crime Quarterly* 23; HB Kruger & H Oosthuizen 'Die Wet op Getuiebeskerming 112 of 1998: Enkele aspekte oor die praktiese werking daarvan' (2001) 26 (3) *Tydskrif vir die Regswetenskap* 78ff.

<sup>22</sup> Bruce op cit (n21) 23; A Minnaar 'Witness Protection Programmes – Some lessons from the South African experience' (2002) 15(3) *Acta Criminologica* 122.

<sup>23</sup> Minnaar op cit (n22) 128; *S v Staggie & Another* supra (n5).

<sup>24</sup> Criminal Procedure Act 51 of 1977.

<sup>25</sup> Section 170A(1) of the Criminal Procedure Act 51 of 1977; *S v Booie and Another* 2005 (1) SACR 599 (B); *S v Manqaba* 2005 (2) SACR 489 (W); *S v T* 2000 (2) SACR 658 (Ck); *S v Stefaans* 1999 (1) SACR 182 (C); *K v The Regional Court Magistrate NO and Others* 1996(1) SACR 434 (E); *S v Mathebula* 1996 (2) SACR 231 (T).

<sup>26</sup> Section 170A(2) of the Criminal Procedure Act 51 of 1977.

an intermediary in respect of child complainants below the age of 14 years immediately upon refusal, and such reasons shall be entered into the record of the proceedings.

Irrespective of these limited exceptions to the foundational principle of confrontation in the South African criminal justice system, no provision for complete witness anonymity is made. In this article the concept of complete witness anonymity as provided for in the criminal justice systems of other jurisdictions (specifically the United Kingdom (UK), Queensland, Australia and New Zealand) will be considered and discussed. This notion of complete witness anonymity will then be juxtaposed against the more stringent approach followed by South African courts with regard to the curtailment of the right to confrontation in order to determine whether complete witness anonymity has a place in our constitutional dispensation.

### 3. Witness anonymity in the United Kingdom, Queensland, Australia and New Zealand

The UK Criminal Evidence Witness Anonymity Act of 2008 makes provision for witness anonymity in criminal proceedings and s 2 of the Act lists the types of measures that may be required to secure the anonymity of a particular witness. It includes:

- that the witness's name and other identifying details be withheld or removed from materials disclosed to any party in the proceedings;<sup>27</sup>
- that the witness may use a pseudonym;<sup>28</sup>
- that the witness is not asked questions of any specified description that might lead to the identification of the witness;<sup>29</sup>
- that the witness is screened to any specified extent;<sup>30</sup> and
- that the witness's voice is subjected to modulation to any specified extent.<sup>31</sup>

Queensland, Australia in the Evidence (Witness Anonymity) Amendment Act 57 of 2000 also gives effect to the needs of particular witnesses to not have their identity disclosed.<sup>32</sup> However, the protection

<sup>27</sup> Section 2(a)(i) and (ii) of the UK Criminal Evidence Witness Anonymity Act of 2008.

<sup>28</sup> Section 2(b) of the UK Criminal Evidence Witness Anonymity Act of 2008.

<sup>29</sup> Section 2(c) of the UK Criminal Evidence Witness Anonymity Act of 2008.

<sup>30</sup> Section 2(d) of the UK Criminal Evidence Witness Anonymity Act of 2008.

<sup>31</sup> Section 2(e) of the UK Criminal Evidence Witness Anonymity Act of 2008; Also see *R v Davis* [2008] 2 Cr. App. R. 33; The Criminal Evidence Witness Anonymity Act of 2008 was enacted and received Royal Assent on 21 July 2008 as a direct response to the judgment of the House of Lords in *R v Davis* on 18 June 2008.

<sup>32</sup> Assented to on 17 November 2000; For a comprehensive discussion on witness anonymity in Australia see: D Lusty 'Anonymous accusers: An historical and comparative analysis of secret witnesses in criminal trials' (2002) 24 *Sydney Law Review* 361 – 426.

afforded by this Act is only available to persons who are or were involved in a controlled operation conducted by a law enforcement agency for the purposes of investigating criminal activities.<sup>33</sup> In New Zealand, s 13A of the Evidence Act 56 of 1908 (introduced in 1986) mirrored the provisions of the Evidence (Witness Anonymity) Amendment Act 57 of 2000 of Queensland, Australia, and it was also only available to police officers and other undercover agents.<sup>34</sup> However, in 1997 with the Evidence (Witness Anonymity) Amendment Act 103 of 1997, the protection of anonymity was extended to all witnesses if their lives were likely to be endangered.<sup>35</sup>

In these jurisdictions, where true witness anonymity is permitted, the opportunity to testify anonymously is not however, a blanket right available to all witnesses. The UK Criminal Evidence Witness Anonymity Act of 2008 lists three conditions that must be met before an anonymity order may be granted. (It is important to note that all three of these conditions must be satisfied before a court will grant an anonymity order.)

- Condition A requires that the measures to be specified in the order are necessary in order to protect the safety of the witness or another person or to prevent any serious damage to the property,<sup>36</sup> or in order to prevent real harm to the public interest (whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on such activities).<sup>37</sup>
- Condition B requires that after having had regard to all the circumstances of the particular case, the taking of these measures as described in s 2 of the Act would be consistent with the defendant receiving a fair trial.<sup>38</sup>
- Condition C requires that the order is necessary to make in the interests of justice and by reason of the fact that it appears to the court that it is important that the witness should testify,<sup>39</sup> and the witness would not testify if the order were not made.<sup>40</sup>

<sup>33</sup> Section 21D of the Evidence (Witness Anonymity) Amendment Act 57 of 2000.

<sup>34</sup> Law Commission of India's Consultation Paper on Witness Protection 13 August 2004 at 9, available at <http://lawcommissionofindia.nic.in/Summary%20of%20the%20Consultation%20paper%20on%20Witness%20protection%20AND%20Questionnaire.pdf>, accessed on 21 October 2010.

<sup>35</sup> Ibid.

<sup>36</sup> Section 4(3)(a) and s 4(6) of the UK Criminal Evidence Witness Anonymity Act of 2008.

<sup>37</sup> Section 4(3)(b) of the UK Criminal Evidence Witness Anonymity Act of 2008.

<sup>38</sup> Section 4(4) of the UK Criminal Evidence Witness Anonymity Act of 2008.

<sup>39</sup> Section 4(5)(a) of the UK Criminal Evidence Witness Anonymity Act of 2008.

<sup>40</sup> Section 4(5)(b) of the UK Criminal Evidence Witness Anonymity Act of 2008.



And, s 5(2) of the Act lists the considerations which the court must have regard to when deciding whether conditions A – C in s 4 of the Act were met. The considerations include:

- the general right of a defendant in criminal proceedings to know the identity of a witness in the proceedings;<sup>41</sup>
- the extent to which the credibility of the witness concerned would be a relevant factor when the weight of his or her evidence comes to be assessed;<sup>42</sup>
- whether evidence given by the witness might be the sole or decisive evidence implicating the defendant;<sup>43</sup>
- whether the witness's evidence could be properly tested (whether on grounds of credibility or otherwise) without his or her identity being disclosed;<sup>44</sup>
- whether there is any reason to believe that the witness (i) has a tendency to be dishonest, or (ii) has any motive to be dishonest in the circumstances of the case, having regard (in particular) to any previous convictions of the witness and to any relationship between the witness and the defendant or any associates of the defendant;<sup>45</sup>
- whether it would be reasonably practicable to protect the witness's identity by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court.<sup>46</sup>

In the most recent version of the New Zealand Act, the Evidence Act 69 of 2006, s 112 now regulates witness anonymity in High Court proceedings. In an application for a witness's anonymity by either the accused or the prosecution, the court must be satisfied that: the safety of the witness or, of any other person, is likely to be endangered, or that there is a likelihood of serious damage to property, if the witness's identity is disclosed.<sup>47</sup> Further, that there is *either* no reason to believe that the witness has a motive or tendency to be dishonest, having regard (where applicable) to the witness's previous convictions or the witness's relationship with the accused or any associates of the accused, *or* the witness's credibility can be tested properly without disclosure of the witness's identity.<sup>48</sup> And finally, that the making of such

<sup>41</sup> Section 5(2)(a) of the UK Criminal Evidence Witness Anonymity Act of 2008.

<sup>42</sup> Section 5(2)(b) of the UK Criminal Evidence Witness Anonymity Act of 2008.

<sup>43</sup> Section 5(2)(c) of the UK Criminal Evidence Witness Anonymity Act of 2008.

<sup>44</sup> Section 5(2)(d) of the UK Criminal Evidence Witness Anonymity Act of 2008.

<sup>45</sup> Section 5(2)(e) of the UK Criminal Evidence Witness Anonymity Act of 2008.

<sup>46</sup> Section 5(2)(f) of the UK Criminal Evidence Witness Anonymity Act of 2008.

<sup>47</sup> Section 112(4)(a) of the Evidence Act 69 of 2006.

<sup>48</sup> Section 112(4)(b)(i) and (ii) of the Evidence Act 69 of 2006.



an order granting witness anonymity would not deprive the accused of a fair trial.<sup>49</sup>

In addition, six guiding factors, which the court must have regard to when considering an application for witness anonymity, are listed in s 112(5) of the Act. The court must take into consideration, the general right of a defendant to know the identity of witnesses,<sup>50</sup> the principle that witness anonymity orders are justified only in exceptional circumstances,<sup>51</sup> the gravity of the offence the accused is being charged with,<sup>52</sup> the importance of the witness's evidence to the case of the party who wishes to call that witness,<sup>53</sup> whether it is practical for the witness to be protected by any means other than an anonymity order,<sup>54</sup> and whether there is other evidence that corroborates the witness's evidence.<sup>55</sup> However, it is also expressly stated in s 112(5) that the consideration of these factors may not limit the working and effect of s 112(4).

But, is such complete witness anonymity really necessary and is it justifiable in terms of the deep-rooted right to confrontation inherent to the accusatorial system?

#### **4. The right of confrontation and the South African criminal justice system**

The antiquity of the foundational right of confrontation dates back to around 80 – 90 A.C.<sup>56</sup> It is said that the right originated in Roman Law and further developed among three main lines: First, legislation of the Emperor Justinian in the year 539 provided the normative foundation of the right of witness confrontation. This norm was derived from custom and practice and was based on the necessity of accurate fact finding in criminal cases. Second, Pope Gregory I emphasised the guarantee of fundamentally fair procedures to all accused persons and finally, the

<sup>49</sup> Section 112(4)(c) of the Evidence Act 69 of 2006.

<sup>50</sup> Section 112(5)(a) of the Evidence Act 69 of 2006.

<sup>51</sup> Section 112(5)(b) of the Evidence Act 69 of 2006.

<sup>52</sup> Section 112(5)(c) of the Evidence Act 69 of 2006.

<sup>53</sup> Section 112(5)(d) of the Evidence Act 69 of 2006.

<sup>54</sup> Section 112(5)(e) of the Evidence Act 69 of 2006.

<sup>55</sup> Section 112(5)(f) of the Evidence Act 69 of 2006.

<sup>56</sup> In the Acts of the Apostles (Acts) 25:16 the Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: 'It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.'; FR Herrmann & BM Speer 'Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause' (1993-1994) 34 *Virginia Journal of International Law* 481; *R v Davis* supra (n31).

great pseudoisidorean forgeries<sup>57</sup> of the mid-ninth century utilised it as a powerful defence tool to ward off unfair accusations and unreliable testimony.<sup>58</sup> The Roman criminal procedure, like that of South Africa, was accusatorial in nature.<sup>59</sup>

In an accusatorial system, the right of confrontation is regarded as a foundational principle of the criminal procedure. The accusatorial system presupposes a 'day in court', thereby requiring a public proceeding in the presence of the accused,<sup>60</sup> that witnesses give their testimony orally (also in the presence of the accused), and that the accused (or his/her legal representative) be allowed to cross-examine witnesses.<sup>61</sup> This principle of open justice is based on the notion of a fair trial and the consideration of publicity; that members of the public are entitled to information.<sup>62</sup> An essential element of the accusatorial proceedings is consequently that witnesses be subjected to examination-in-chief and cross-examination during the public trial.<sup>63</sup> The purpose of cross-examination in this context is to elicit information from the witness favourable to one's own case, and also to cast doubt upon the evidence provided by the witness during examination-in-chief.<sup>64</sup> It is a fundamental belief in accusatorial systems that these 'tools' assist in the discovering of truth and the assessment of credibility.<sup>65</sup>

However, it is also evident that testifying in an accusatorial environment can be an extremely traumatic and stressful experience for victims and witnesses alike. Witnesses are required to testify in the presence of the accused, as well as a group of people, previously unknown to them. Such testimony may often be very personal and/or embarrassing. Cross-examination can furthermore be hostile in nature, and especially intimidating in the setting of a courtroom. The court environment itself, the procedure being followed and the language used are additional

<sup>57</sup> In the mid-ninth century, a group of clerics undertook to forge legal texts. Their product was a massive collection of legal opinion ascribed to an early pope, Isidorus Mercator. Herrmann & Speer op cit (n56) at 503.

<sup>58</sup> Herrmann & Speer op cit (n56) 483 – 484; Lusty op cit (n32) 363.

<sup>59</sup> Herrmann & Speer op cit (n56) 484.

<sup>60</sup> Section 35(3)(c) of the Constitution of the Republic of South Africa, 1996.

<sup>61</sup> K Müller 'The effect of the accusatorial system on the child witness' (2002) 1(2) *CARSA* 13; Lusty op cit (n32) 361.

<sup>62</sup> *S v Geiges & Others (M & G Media Ltd and others intervening)* 2007 (2) SACR 507 (T) paragraphs [52] – [61] at 519c – 522j.

<sup>63</sup> Müller op cit (n61) 14.

<sup>64</sup> Müller op cit (n61) 14; *Klink v Regional Court Magistrate NO and Others* 1996 (3) BCLR 402 (SE).

<sup>65</sup> Müller op cit (n61) 14.

features of the accusatorial system that may be disconcerting to victims and witnesses.<sup>66</sup>

Thus, the negative (and sometimes unfair) impact of the rules of an accusatorial criminal procedure system on witnesses and victims has also been recognised and addressed (to a certain extent) by allowing for exceptions to the foundational principle of the right of confrontation. In *S v Staggie and another*,<sup>67</sup> it was held that the right to a public trial was a fundamental part of the legal system, but that it did not mean that there were no exceptions to the general rule.<sup>68</sup> In 1989, the South African Law Commission (now the Law Reform Commission) concluded that the accusatorial system, with its strong emphasis on cross-examination was insensitive and unfair to child witnesses.<sup>69</sup> Specific provisions in the Criminal Procedure Act,<sup>70</sup> now make provision for a departure from the strict right of confrontation in particular situations. (These provisions were discussed in section 2 of the article.) The court in *K v The Regional Court Magistrate NO and others*,<sup>71</sup> held that although vital, the right to cross-examine witnesses was not an absolute right. And, whether the curtailment or limitation of cross-examination resulted in the negation of a right to a fair trial, depended upon the circumstances of the particular case.<sup>72</sup> Such exceptions to the right of confrontation in the South African criminal justice system have been explained and justified in terms of the balancing of the rights of an accused against the rights of a victim/witness.<sup>73</sup>

In the case of *Maryland v Craig*,<sup>74</sup> the USA Supreme Court described the right guaranteed by the confrontation clause,<sup>75</sup> in terms of the following four elements:

- the physical examination of the witness,
- observation of the witness,

<sup>66</sup> Müller op cit (n61) 13; Bruce op cit (n21) 24. J Simon 'Pre-recorded videotaped evidence of child witnesses' (2006) 1 *South African Journal of Criminal Justice* 59; *S v Staggie & another* supra (n5).

<sup>67</sup> *S v Staggie & another* supra (n5).

<sup>68</sup> *S v Staggie & another* supra (n5) at 243g.

<sup>69</sup> Simon op cit (n66) 57.

<sup>70</sup> Criminal Procedure Act 51 of 1977; See ss153(1)-(6), 154, 158 & 170A.

<sup>71</sup> *K v The Regional Court Magistrate NO and others* supra (n25).

<sup>72</sup> *K v The Regional Court Magistrate NO and others* supra (n25) at 436; Lusty op cit (n32) 362; *S v Staggie & another* supra (n5).

<sup>73</sup> *Klink v Regional Magistrate NO* supra (n64); Simon op cit (n66) 72; *S v Staggie & another* supra (n5) at 249a – b; *R v Davis* supra (n31).

<sup>74</sup> *Maryland v. Craig*, 497 U.S. 836 (1990); Law Commission of India's Consultation paper on Witness Protection op cit (n34).

<sup>75</sup> Sixth Amendment to the Constitution of the United States of America.

- the insurance that the witness will give his/her testimony under oath – thereby impressing the seriousness of the matter upon the witness and guarding against the possibility of a lie,
- the submission of the witness to cross-examination and the provision of an opportunity to observe the witness's demeanour, thus aiding in the assessment of the witness's credibility.<sup>76</sup>

The combined effect of these four elements serves the right of the accused to confront his/her witnesses. This right can therefore be described as a functional mechanism aimed at promoting reliability in criminal matters and the advancement of a practical concern for the accuracy of the truth-determining process.<sup>77</sup> The value of face-to-face confrontation, for example, was found to reduce the risk of a witness to wrongfully implicate an innocent person.<sup>78</sup> The court also recognised the strong symbolic purpose being served by requiring that a witness testify in the presence of the accused.<sup>79</sup> Nevertheless, while it is evident that face-to-face confrontation forms the core of the foundational principle of a right to a fair trial and the right to confront witnesses, it can definitely not be regarded as the *sine qua non* of the confrontation right.<sup>80</sup> As, in some instances, a face-to-face confrontation might actually cause significant emotional distress for a witness and the confrontation will then, in fact, rather disserve the confrontation clause's truth-seeking goal.<sup>81</sup> The court consequently concluded that there exists no absolute right to have a face-to-face confrontation between the accused and the witness.<sup>82</sup> The USA confrontation clause rather reflects a preference that must occasionally give way to considerations of public policy and the necessities of the case.<sup>83</sup> Although the victim-witnesses in the *Maryland* case were children, who suffered

<sup>76</sup> *Maryland v. Craig* supra (n74) at 845 – 848; Also see *California v. Green*, 399 U.S. 149, 157 (1970).

<sup>77</sup> *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *Lee v. Illinois*, 476 U.S. 530, 540 (1986); *Faretta v. California*, 422 U.S. 806, 818 (1975); *Strickland v. Washington*, 466 U.S. 668, 684-685 (1984); *Lusty* op cit (n32) 362.

<sup>78</sup> *Maryland v. Craig* supra (n74) at 847.

<sup>79</sup> *Maryland v. Craig* supra (n28) at 848.

<sup>80</sup> *California v. Green* supra (n30); *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985).

<sup>81</sup> *Maryland v. Craig* supra (n74) at 870.

<sup>82</sup> The court also said, however, that although this right is not absolute, it will not be easily dispensed with. *Maryland v. Craig* supra (n74) at 850 – 851; R Bloer 'Maryland v Craig: The Court's use as evidence of videotaped testimony of a child who has been sexually abused is declared not to violate a criminal defendant's sixth amendment rights to confront his accuser' (1991) 19 *Southern University Law Review* 285.

<sup>83</sup> *Maryland v. Craig* supra (n74) at 849 – 850; Also see *Mattox v United States* 156 US237 (1895); Not all states in the USA have adopted this fluid approach to the right of confrontation, see T Cusick 'Televised justice: Toward a new definition of confrontation under Maryland v Craig' (1990-1991) 40 *Catholic University Law Review* 967 – 1000.

sexual abuse, the exception was later also extended to an adult male robbery victim to testify by closed-circuit television.<sup>84</sup>

But, when will these exceptions to the right of confrontation be allowed? How will it be validated? And, can the special vulnerability of a witness/victim be presumed, or must it be proved? In the case of *DPP, Transvaal v Minister of Justice and Constitutional Development & others*,<sup>85</sup> the use of intermediaries in terms of s 170A of the Criminal Procedure Act,<sup>86</sup> and with specific regard to child witnesses and victims were considered. Here it was held that in every case where a child was to provide testimony, the presiding judge – out of his/her own accord if the matter was not raised by the prosecution – had to consider the possible vulnerability of the witness/victim and had to raise the possibility of using an intermediary to assist the child witness/victim in providing their testimony.<sup>87</sup> It was furthermore held, that in order to exercise this discretion, the presiding officer should assess the individual needs, wishes and feelings of each child.<sup>88</sup> With regard to proceedings in camera it was also held that each situation should be dealt with on its own merits, taking into consideration the nature of the evidence to be provided by the child witness/victim and the age of the child.<sup>89</sup>

Although this case dealt with child witnesses specifically and then also primarily with s 170A of the Criminal Procedure Act, the stance of the court with regard to these specific limitations of the right of confrontation can be viewed as a clear indication that the special vulnerabilities of a witness/victim in general need not necessarily be proved, and that exceptions to the foundational principle of confrontation may in certain situations even be recommended by a court and not only be considered in response to a request or application. Similarly, in *S v Staggie & another*,<sup>90</sup> – dealing with a request that a victim give testimony in camera – the court held that s 158 of the Criminal Procedure Act,<sup>91</sup> which allows for testimony to be provided by means of electronic media like a closed-circuit television, is couched in open-ended language and conferred a discretion on the court to

<sup>84</sup> *Gilpin v McCormick* 921 F.2d (9th Cir. 1990); Bloer op cit (n82) 289.

<sup>85</sup> *DPP, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (2) SACR 130 (CC).

<sup>86</sup> Criminal Procedure Act 51 of 1977.

<sup>87</sup> *DPP, Transvaal v Minister of Justice and Constitutional Development & others* supra (n85) at paras [113]–[114] at 173f–h; *S v Dayimani* 2006 (2) SACR 594 (E).

<sup>88</sup> *DPP, Transvaal v Minister of Justice and Constitutional Development & others* supra (n85) at para [123] at 176b.

<sup>89</sup> *DPP, Transvaal v Minister of Justice and Constitutional Development & others* supra (n85) at paras [145] and [146] at 181h–i and 182b–c; *S v M* supra (n16).

<sup>90</sup> *S v Staggie & another* supra (n5).

<sup>91</sup> Criminal Procedure Act 51 of 1977.

determine proceedings in the best interests of justice (and especially to protect witnesses) and that the discretion should not be restrictively construed.<sup>92</sup>

But, not all agree that such extension of the parameters of the right of confrontation should be allowed. For example, according to Steytler the right of confrontation essentially include ‘...the right to have the fullest opportunity of cross-examining meaningfully and effectively. Where the cross-examiner’s questions are substituted by another person and the examination does not take place within the physical presence of the examiner, there is a *prima facie* limitation of the right when given its broadest adversarial meaning.’<sup>93</sup> And, in the USA, a Federal court refused to allow a four-year-old to use a closed circuit-television in order to testify and identify his father’s alleged murderer.<sup>94</sup>

## 5. Curtailing the right to confrontation: How far is too far?

Very few jurisdictions make provision for true/complete witness anonymity in criminal proceedings, and in those countries where provision are made for such anonymity very few examples from case law actually exist. There have been at least three cases in which anonymity orders were made in terms of the New Zealand Evidence (Witness Anonymity) Amendment Act 103 of 1997, but none of the witnesses actually testified anonymously at the trial.<sup>95</sup> All three cases involved gang-related violence and the witnesses granted anonymity in each of the cases were innocent bystanders. In *R v Dunnill*,<sup>96</sup> the order was ineffective as the identity of the witness became widely known even before the trial commenced. In *The Queen v Michael James Curry*,<sup>97</sup> the accused pled guilty prior to the trial. And in *The Queen v Lawrence Glen Atkins*,<sup>98</sup> a pre-trial appeal against the anonymity order led to the dismissal of the order.

Witness anonymity has also been the subject of discussion in a few cases and with relation to various types of witnesses and criminal offences in India. In *Kartar Singh v. State of Punjab*,<sup>99</sup> the Supreme Court

<sup>92</sup> *S v Staggie & another* supra (n5) at 248a and 250f – g.

<sup>93</sup> N Steytler *Constitutional Criminal Procedure* (1998) 348. In the American case of *Douglas v Alabama* 380 US 415 (1965), the court held that the primary interest of the confrontation clause in the Sixth Amendment is the right of cross-examination; Simon op cit (n66) 71.

<sup>94</sup> *Government of the Virgin Island v Riley* 750 F. Supp. 727 (D. Virgin Islands 1990); Bloer op cit (82) 289.

<sup>95</sup> Lusty op cit (n32) 401.

<sup>96</sup> [1998] 2 NZLR 341; Lusty op cit (n32) 401.

<sup>97</sup> [2000] NZCA 221 (28 September 2000); Lusty op cit (n32) 401.

<sup>98</sup> [2000] NZCA 11 (9 February 2000); Lusty op cit (n32) 401.

<sup>99</sup> (1994) 3 SCC 569; Also see *People’s Union of Civil Liberties v. Union of India* (2003) 10 SCALE 967.

held that the right of an accused to cross-examine the prosecution's witnesses was not absolute, but was subject to exceptions. Sections 16(2) and (3) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA), for example, provides a court with the discretion to keep the identity and address of a witness secret. Also, the maintenance of the anonymity of the victims of rape was emphasized and confirmed in *Delhi Domestic Working Women's Forum v Union of India*,<sup>100</sup> and *State of Punjab v Gurmit Singh*.<sup>101</sup> In *Sakshi v Union of India*,<sup>102</sup> the need for procedural safeguards, including the right to withhold a witness's identity, and to protect the victim of child sexual abuse during the conduct of the trial was stressed. However, none of these cases provided guidelines on the manner in which the identity of a witness can be kept confidential either before or during the trial, and the considerations to be taken into account when making such an order.<sup>103</sup>

In the English case of *R v Davis*,<sup>104</sup> Lord Carswell held that it was possible to infer some propositions from the order made by the trial judge in the *Davis* case, as well as subsequent cases dealing with witness anonymity. He held that there should always be a presumption in favour of open justice and confrontation of a defendant by his/her accuser.<sup>105</sup> And, while it is possible to allow departures from the basic rule of open justice to some extent, a clear case of necessity should first be made out.<sup>106</sup> The court should always be sufficiently satisfied that the witness's reluctance to give evidence in the ordinary manner is genuine and that the extent of his/her fear justifies a degree of anonymity. Many anonymising expedients furthermore exist, and the more of these expedients the court choose to adopt, the stronger the case must be for invading the principle of open justice.<sup>107</sup> Another important consideration identified by Lord Carswell is the relative importance of the witness's testimony in the particular matter;

‘...if the testimony constitutes the sole or decisive evidence against the defendant, anonymising which prevents or unduly hinders the defendant and his advisers from taking steps to undermine the credit of the witness is

<sup>100</sup> (1995) 1 SCC 14.

<sup>101</sup> (1996) 2 SCC 384.

<sup>102</sup> (2004) 6 SCALE 15.

<sup>103</sup> Also see *Best Bakery Case* (2004) 4 SCC 158; *Neelam Katara v Union of India* (judgment dated 14-10-2003) and *Bimal Kaur Khalsa* AIR 1988 P&H 95; Law Commission of India's Consultation paper on Witness Protection 13 August 2004 op cit (n34).

<sup>104</sup> *R v Davis* supra (n31).

<sup>105</sup> *R v Davis* supra (n31) at para 59.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid; including withholding a witness's name and personal details, screening of the witness from the accused and the public, screening of the accused from the accused legal representatives and disguising of the witnesses' voice.



most likely to operate unfairly. It is a question of fact in any given case what, if any, measures would be compatible with sufficient fairness of the trial.<sup>108</sup>

In the South African case of *S v Nzama & Another*,<sup>109</sup> the notion that an accused not be informed of the identity of witnesses testifying against him was described as incomprehensible in terms of an accused's right to a fair trial.<sup>110</sup> In this case the prosecution applied for an order that one of the state's witnesses be permitted to testify in '...such disguise as would preclude the accused, the court or anyone else from being aware of what he looked like and of his identity.'<sup>111</sup> The court conceded that s 153(2)(b) of the Criminal Procedure Act does not accord power to the court to grant such an order, and further, that the notion was obscure to think that a court is to be expected to be able to judge the credibility of a witness if the court cannot see the witness's features and the court cannot inform itself by observation of how the witness reacts to questions.<sup>112</sup>

Likewise, in *S v Leepile & Others*,<sup>113</sup> it was held that although a witness, in appropriate circumstances, may be allowed to remain anonymous as far as persons other than those engaged in the case are concerned when a trial is heard in camera, the withholding of this information from the accused himself and his legal representatives was inconceivable.<sup>114</sup> The court held that serious difficulties regarding the solution of a variety of legal questions could arise in such an instance. For example:

'To what extent must defence counsel's cross-examination be restricted in order to comply with the order? How much information may he be allowed to elicit from the witness regarding his birth, training, marital status, family, residence and general biographical detail before he runs the risk of infringing the order? If counsel by chance should become aware of the witness' true identity and this leads to the discovery of valuable information regarding the witness' credibility, may this information not be used in cross-examination if it involves disclosure or verification of the witness' true identity?'<sup>115</sup>

Also, 'if the dispute is resolved in favour of the accused, the order is infringed. If in favour of the State, the accused could be prejudiced and the extent of the prejudice difficult, if not impossible, to assess.'<sup>116</sup>

<sup>108</sup> *R v Davis* supra (n31) at para 59.

<sup>109</sup> *S v Nzama & another* 1997 (1) SACR 542 (D).

<sup>110</sup> *S v Nzama & another* supra (n109) at 543D.

<sup>111</sup> *S v Nzama & another* supra (n110) at 543D.

<sup>112</sup> Also see *S v Leepile and Others* (5) 1986 (4) SA 187 (W) at 191B-D.

<sup>113</sup> *S v Leepile & Others* supra (n112).

<sup>114</sup> *S v Leepile & others* supra (n112) at 189G-H.

<sup>115</sup> *S v Leepile & others* (n112) at 190D-E.

<sup>116</sup> *S v Leepile & others* (n112) at 190F.

But in *S v Pastoors*,<sup>117</sup> the court came to a different conclusion. In this case s 153(2) of the Criminal Procedure Act,<sup>118</sup> and specifically a court's discretion to allow that a witness's identity not be revealed if there is a likelihood that harm may result, was considered. The court described the expression, 'a likelihood that harm may result' as a reasonable possibility of such harm – a question of fact – to be decided on the facts and circumstances of each particular case.<sup>119</sup> The applicant in the *Pastoors* case was consequently allowed to testify behind closed doors, he was exempted from the duty to disclose his name to the court and he was authorised to adopt any pseudonym for the purposes of the trial. The court furthermore held that should the accused at any stage of the proceedings consider that the witness's true identity is pivotal to their case, then the court will consider an application for the witness's true identity to be revealed.<sup>120</sup> And in *S v Madlavu & others*,<sup>121</sup> the expression, 'a likelihood that harm may result' was given an even broader meaning. Here it was suggested that the court is not bound to the particular facts of the case but that,

'...the Court can travel beyond the mere facts of this case and draw upon its own judicial experience in other cases of a like nature, and consider the nature of the act alleged in the indictment; the atmosphere of the case itself; the type of case with which we have to deal; the prevailing circumstances as a matter of common knowledge in which the crimes alleged in the indictment were alleged to have been committed and similar considerations.'<sup>122</sup>

Following a similar line of argument as in the *Pastoors* and *Madlavu* cases, the different ways in which people respond to and deal with crime, as well as the potentially intimidating and traumatic effect that the *modus operandi* of the accusatorial system may have on witnesses and victims, therefore necessitates that scope is allowed for appropriate and correct interpretations of a victim's and/or witness's need for protection immediately after the crime and also during the ensuing criminal proceeding in the context of the criminal justice system.<sup>123</sup> And, in some instances, this may require that a court protects the identity of a victim or witness, by allowing for and warranting the complete anonymity of such persons testifying against offenders. And although this is a drastic restriction on the right of confrontation, in *S v Ndblovu*

<sup>117</sup> *S v Pastoors* 1986 (4) SA 222 (W).

<sup>118</sup> Criminal Procedure Act 51 of 1977.

<sup>119</sup> *S v Pastoors* supra (n117) at 224 F; *S v Madlavu & Others* 1978 (4) SA 218 (E) at 222G.

<sup>120</sup> *S v Pastoors* supra (n117) at 226F-227A.

<sup>121</sup> *S v Madlavu & Others* supra (n119).

<sup>122</sup> *S v Madlavu & Others* supra (n119) at 222H – 223A.

<sup>123</sup> Department of Justice and Constitutional Development *Understanding the South African Victim's Charter – A Conceptual Framework*, 2007 (see [http://www.justice.gov.za/VC/docs/2008Understanding%20victims\\_concept.pdf](http://www.justice.gov.za/VC/docs/2008Understanding%20victims_concept.pdf), accessed on 28 October 2010).

& *Others*,<sup>124</sup> it was held that the right to confrontation and to challenge evidence is not guaranteed but rather subject to limitation in terms of s 36 of the Constitution. It was recently also recognised, that to truly give effect to victim's rights and needs specifically, as envisaged in the Service Charter for Victims of Crime, a paradigm shift and complete overhaul of the South African criminal justice system might be necessary.<sup>125</sup> This approach was endorsed by the Canadian Supreme Court in *Regina v Toten*:

'The public adversarial process is, however, a means to an end – the ascertainment of truth – and has virtue only to the extent that it serves that end. Where the established process hinders the search for truth, it should be modified unless due process or resource-based considerations preclude such modification.'<sup>126</sup>

This point of view was also endorsed in *S v Ntoae & others*,<sup>127</sup> where the state lodged an application that two state witnesses testify behind closed doors and that their identity not be revealed to anyone other than the court. Navsa J considered the two contradicting judgements in *S v Pastoors*,<sup>128</sup> and *S v Leepile*,<sup>129</sup> and held that the *Leepile* case was decided at a time of '...cloak and dagger policing and of faceless and nameless accusers.' In the *Leepile* case Ackermann J was consequently correctly concerned about the accused being denied a fair trial should the witness's identity not be disclosed. Ackermann J was also correctly concerned about the dwindling of public confidence in the judicial system of that time. Today, however, South Africa is faced with a scourge of crime and Navsa J emphasised the intention of s 153(2) (b) of the Criminal Procedure Act which is to aid the administration of justice by ensuring that members of the public, who do their civic duty and come forward to do so, can testify without fear of reprisals.<sup>130</sup> It has, for example, already been allowed by the Constitutional Court that documents be withheld from the accused in justifiable circumstanc-

<sup>124</sup> *S v Ndhlovu & Others* 2002 (6) SA 305 (SCA) at paras [17], [18], [22] and [24] at 317G – 318E/F, 319H – I and 320F – 321C.

<sup>125</sup> Joint report by the Portfolio Committee on Correctional Services, the Portfolio Committee on Justice and Constitutional Development, and the Portfolio Committee on Safety and Security: Review of the Criminal Justice System, 19 February 2009, available at <http://www.pmg.org.za/docs/2009/comreports/090302pcjusticereport5.htm>, accessed on 28 October 2010.

<sup>126</sup> *Regina v Toten* (1993)16 CRR (2d) 49 Ontario, C.A.; Müller op cit (n61) 23.

<sup>127</sup> *S v Ntoae & Others* 2000 (1) SACR 17 (W) at 18D.

<sup>128</sup> *S v Pastoors* supra (n117).

<sup>129</sup> *S v Leepile & others* supra (n112), the case of *S v Ntoae* quotes *S v Leepile & Others* (1) 1986 (2) SA 333 (T).

<sup>130</sup> *S v Ntoae & others* (n127) at 30.

es.<sup>131</sup> While he recognised the need, in exceptional circumstances, for the identity of a witness to remain anonymous, he also warned that withholding the name of a witness from the court itself could very rarely, if ever be justified.<sup>132</sup> ‘The public requires to know that in appropriate circumstances, within the confines of the law, witnesses who may be of assistance to the Court will be protected.’<sup>133</sup>

## 6. Conclusion

In the face of arguments suggesting that witness anonymity violates the accused’s right to a fair trial, it must also be considered that witness anonymity may in certain instances be the only measure available to ensure a fair trial for all.<sup>134</sup> Witnesses are central to crime investigation and prosecution, and the legal system is depended, in part, on the co-operation of the community.<sup>135</sup> Thus, individuals whose rights had been transgressed ought to believe that they would be protected in the justice process when dealing with the person or persons who perpetrated the crime.<sup>136</sup>

Such arguments in favour of witness anonymity is primarily based on the contention that the right of confrontation is not absolute, that the prejudice to the accused can be minimised, and that witness anonymity can be justified in terms of the balancing of the rights of the witness against that of the accused, together with the purported balancing of the competing interests in the administration of criminal justice.<sup>137</sup> However, it must also be noted that this approach is unfairly balanced against the accused from the outset.<sup>138</sup> To allow true witness anonymity effectively places an onus on the accused to show that the non-disclosure of the witness’s identity would be substantially and unduly prejudicial.<sup>139</sup> In addition, the significance of the particular witness’s identity cannot be predicted in advance of actual inquiries from the accused, and such inquiries will, in turn, be depended on prior knowledge of the witness’s identity.<sup>140</sup>

<sup>131</sup> *Shabalala & others v Attorney-General of the Transvaal & Another* 1995 (2) SACR 761 (CC); 1995 (12) BCLR 1593 (CC); *S v Ntoae & Others* supra (n127) at 31.

<sup>132</sup> *S v Ntoae & Others* supra (n127) at 30.

<sup>133</sup> *S v Ntoae & Others* supra (n127) at 30.

<sup>134</sup> *State v Pastoors* supra (n117).

<sup>135</sup> Bruce op cit (n21) 28; Irish, Magadhla, Qhobosheane, & Newham op cit (n5); Cusick op cit (n83).

<sup>136</sup> *S v Staggie & another* supra (n5) 244i – 245b.

<sup>137</sup> Lusty op cit (n32) 423.

<sup>138</sup> Lusty op cit (n32) 423.

<sup>139</sup> Lusty op cit (n32) 423.

<sup>140</sup> Lusty op cit (n32) 423.

'Requiring an accused to satisfy such an onus as a precondition to disclosure of an adverse witness's true identity would deny a substantial right and withdraw one of the safeguards essential to a fair trial, effectively emasculating the right of cross-examination itself.'<sup>141</sup>

While the verdict is still out on whether such a drastic curtailment of the right of confrontation is justified in terms of an accused's right to a fair trial, the need for the sufficient and effective protection of witnesses remains a serious weakness in the fight against crime.

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<sup>141</sup> Lusty op cit (n32) 424; *Alford v United States* 282 US 687 (1931) 691-4; *Smith v Illinois* 390 US 129 (1967).